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No. 179

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1953

CECIL L. COURTNEY, PHILIP T. FERRIS,
AND RAY PARKS,
PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS, AND BRIEF IN SUPPORT OF PETITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.....

CECIL L. COURTNEY, PHILIP T. FERRIS,
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PETITIONERS,

vs.

TY LOCKETT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

These were original applications for writs of habeas corpus brought in the Supreme Court of the State of Kansas, by petitioners herein, and consolidated for hearing, which alleged petitioners were unlawfully imprisoned

and restrained by Ty Lockett, sheriff and respondent herein, pursuant to judgments and sentences by the District Court of Sedgwick County, Kansas, for direct contempt of said District Court at a judicial inquisition proceeding allegedly authorized by the laws of said state. The applications were denied (Tr. p. 65-19; App. B, p. 61) and petitioners moved for rehearing of the said application. That motion was also denied. (Tr. p. 74)

The principal questions involved in said applications were:

1. Whether the said District Court had jurisdiction to render the judgments and impose the sentences for direct contempt of court in the said inquisition proceedings in camera, and without affording petitioners an opportunity to confer with counsel prior to the judgments and sentence.

2. Whether the privileges and immunities extended to the petitioners by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States were abridged by the judgments, sentences and imprisonment.

3. Whether the inquisition proceedings at which petitioners were adjudged guilty of direct contempt of court were valid under the laws of the State of Kansas.

The foregoing questions were determined adversely to the petitioners by the Supreme Court of Kansas in the original proceedings in habeas corpus brought therein.

II. JURISDICTIONAL STATEMENT.

The jurisdiction of this court is invoked under section 1257 of Title 28 of the United States code. The judgment of the Supreme Court of Kansas is a final judgment, rendered on March 3, 1954, and the said court is the highest court of the state in which a decision in these cases could be had. Petitioners' motions for rehearing were denied on April 14, 1954. There were specially set up and claimed under the Constitution of the United States rights, privileges and immunities of the petitioners.

The stages in the proceedings in the said Supreme Court of Kansas, which was the court of first instance, at which, and the manner in which, the federal questions sought to be reviewed, were raised, are as follows:

1. By the applications for writs of habeas corpus filed by petitioners in said Supreme Court of Kansas. (Tr. pp. 3, 7, 9; App. B, pp. 35, 37, 39)

2. By briefs and oral argument as reflected in the opinion filed by the said Supreme Court of Kansas. (Tr. p. 65; App. p. 43)

The manner in which the federal questions sought to be reviewed were passed upon by the court was as follows, where is was held that:

1. The constitutional guaranties relied upon by petitioners apply only to criminal prosecutions. (Tr. 65-9; App. D, p. 53)

2. There was no violation of constitutional provisions where petitioners were accused of contempt, tried, convicted and sentenced without formal charges

preferred against them, and without evidence or counsel. (Tr. p. 65-11; App. D, p. 54.)

3. The secrecy in which the inquisition was conducted does not violate constitutional provisions which apply only to criminal prosecutions, as petitioners had not been accused of committing any crime. (Tr. p. 65-12; App. D, p. 55.)

III. QUESTIONS PRESENTED.

1. May witnesses in a secret judicial inquisition proceeding be accused of direct contempt, tried, sentenced and committed to jail in the same secret proceeding without interruption of the secrecy?

2. Does the failure to afford such witnesses an opportunity to confer with counsel, and to purge or defend themselves, when they stand accused of direct contempt for their refusal to reply to questions to which they have raised objections, at a judicial inquisition conducted in secrecy, constitute a denial of due process of law?

IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. The decision of the Supreme Court of Kansas is probably not in accord with applicable decisions of this court.

2. The decision of the Supreme Court of Kansas is in conflict with the decision of this court, on the same or similar matters, in the case of *Re William Oliver*, 333 U. S. 257. (March 8, 1948)

Wherefore, your petitioners pray that a writ of certiorari directed to the Supreme Court of the State of Kansas, commanding said court to certify and send to this court a full and complete transcript of the record and proceedings of the said court had in the consolidated cases numbered and entitled on its docket, No. 39,454, In the Matter of the Application of Cecil L. Courtney for a Writ of Habeas Corpus; No. 39,455, In the Matter of the Application of Phillip T. Ferris for a Writ of Habeas Corpus; and No. 39,459, In the Matter of the Application of Ray Parks for a Writ of Habeas Corpus, to the end that the errors aforesaid may be corrected by this court:

Dated.....1954.

_____Attorney for Petitioners.

PAYNE H. RATNER,
444 N. Market,
Wichita, Kansas.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1953

No.....

CECIL L. COURTNEY, PHILLIP T. FERRIS, AND RAY PARKS,
PETITIONERS BELOW,

vs.

TY LOCKETT,
RESPONDENT BELOW.

BRIEF OF PETITIONERS.

I. OPINION OF COURT BELOW.

The opinion of the Supreme Court of Kansas (Tr. p. 65) is reported in volume 175 at page 704 of The Kansas Reports, and appended hereto as Appendix D.

II. JURISDICTION.

1. The date of the decree to be reviewed is March 3, 1954, rehearing denied, April 14, 1954. (Tr. p. 65, Syl. 4, p. 4)

2. The statutory provision which is believed to sustain the jurisdiction of this court is section 1257 of Title 28 of the United States Code.

3. The judgment of the Supreme Court of Kansas is a final judgment and the said court is the highest court in the state in which a decision in these cases could be

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had; petitioners' motions for rehearing were denied. Rights, privileges and immunities of the petitioners under the Constitution of the United States were specially set up and claimed in petitioners' original applications for writs of habeas corpus in the said court and in their briefs and oral arguments in the said court.

4. The cases believed to sustain said jurisdiction are as follows:

Coleman v. Miller, 307 U. S. 433.
Garrett v. Moore-McCormick, 317 U. S. 239, pp. 245, 246.
McNabb v. U. S., 318 U. S. 332, p. 340.

III. STATEMENT OF THE CASE.

This has already been stated in the preceding and annexed petition for certiorari under par. I, p. 1 of said petition, which is hereby adopted and made a part of this brief.

IV. SPECIFICATIONS OF ERRORS.

The Supreme Court of Kansas erred in holding that:

1. There were no violations of the due process clause of the Fourteenth Amendment to the Constitution of the United States, where the petitioners were accused of contempt, tried, convicted and sentenced without formal charges preferred against them, and without evidence or counsel.

2. There was no violation of the Fourteenth Amendment to the said Constitution, where petitioners were tried, convicted and sentenced to jail for contempt, as a

secret inquisition proceeding, for the reason that petitioners had not been accused of any crime.

ARGUMENT.

Summary of the Argument.

Point A: The accusation, trial, conviction and commitment to jail of witnesses called to testify at a secret judicial inquisition proceeding, for contempt of the judicial officer conducting such proceeding, where the inquisition and subsequent trial and conviction were conducted in absolute secrecy, constitutes an abridgement of the right to a public trial of such accused witnesses and deprives such witnesses of their liberty without due process of law in contravention of the Fourteenth Amendment to the Constitution.

Point B: The failure to afford such accused witnesses an opportunity to confer with counsel, or defend themselves, when they stand accused of direct contempt of a judicial inquisitor, or to purge themselves after they were convicted in such secret proceeding, for their refusal to reply to questions to which they had interposed objections, constitutes an abridgement of the right to assistance of counsel for the defense of such accused witnesses, and denies such accused witnesses procedural due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

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Point A.

Petitioners submit that their accusation, trial, conviction and commitment to jail for contempt of court, in a proceeding conducted *in camera* was a denial of their right to a public trial and a denial of procedural due process of law.

The petitioners were taxicab drivers, and were members of a union called out on strike; certain acts of violence had occurred and an inquisition, allegedly pursuant to Kansas Law[1], was initiated by the county attorney, who filed a Statement and Request for Inquisition in the District Court of Sedgwick County. (Tr. p. 17, Ex. "E")

The petitioners were subsequently served with "forthwith" subpoenas (the petitioner Ferris was arrested on a bench warrant and held incommunicado for six hours prior to being brought before the inquisition) (Tr. p. 37), and they were compelled to testify at the inquisition. The proceeding was conducted in complete secrecy. The public, press and counsel were excluded. Upon the refusal of petitioners to answer certain questions propounded by "special volunteer" deputy county attorneys and the judge, before whom the proceedings were being conducted, (Tr. pp. 20-7, 21-55, 22-11a) the petitioners were accused of direct contempt of court, adjudged guilty and sentenced to jail. Ferris and Parks were each sentenced to terms of one year, and Courtney was sentenced to 90 days. (Tr. pp. 20-7, 21-55, 22-11a). They were

1. Appendix A, p. 31.

committed to the custody of the respondent, Sheriff of Sedgwick County, for confinement pursuant to the sentences.

Original applications for writs of habeas corpus[2] were filed in the Supreme Court of the State, and were denied, which ruling is now sought to be reviewed by certiorari.

Petitioners submit that the proceeding at which they were accused and convicted of contempt, and at which they were sentenced and committed to the custody of respondent for confinement in jail deprived them of their liberty without affording them the notice, opportunity to defend themselves or a public trial as required by the due process clause of the Fourteenth Amendment.

The case of *Re William Oliver*, 333 U. S. 257, in which writ of certiorari to the Supreme Court of Michigan was issued, is closely analogous upon its facts to the instant case. In the cited case petitioner had been convicted and sentenced in secrecy for contempt of a judge sitting as a "one man grand jury" under the Michigan procedure. The Supreme Court of that State denied a petition for a writ of habeas corpus, and certiorari followed. The petitioner in the cited case contended that the summary manner in which he had been sentenced to jail in the secrecy of the grand jury chambers had deprived him of his liberty without affording him an opportunity to defend himself, or a trial as required by the due process clause of the Fourteenth Amendment. The cited

2. Appendix B, p. 34; Tr. pp. 3, 7, 9.

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case and the instant case are distinguishable only upon the basis of the differences in terminology of the Michigan Statute, 3 Mich. Comp. Laws of 1929, sec. 17217, et. seq.[3], and the Kansas Statute, G. S. of Kansas, 1949, Sec. 62-3014; and the circumstance that the petitioner in the cited case was committed for contempt for giving false and evasive answers to questions propounded by a circuit judge sitting as a "one man grand jury"; whereas, in the instant cases, petitioners were committed for refusing to answer certain questions propounded by a district judge and deputy county attorney in an inquisition proceeding. In both the instant and cited cases, petitioners were accused of contempt and convicted summarily, *in camera*, upon their refusal to respond satisfactorily to questions propounded by judicial inquisitors, and summarily sentenced to confinement by the same judicial interrogators, without interruption of the secrecy and without being afforded notice or given an opportunity to confer with counsel. In the instant cases petitioners were not even afforded an opportunity to purge themselves of the alleged contempt.

In the *Oliver Case, supra,* this court in its opinion written by Justice Black, said, loc. cit. 264:

> "Many reasons have been advanced to support grand jury secrecy. See e. g., Hale v. Henkel, 201 U. S. 43 . . . State v. Branch, 68 N. C. 186 . . . But those reasons have never been thought to justify secrecy in the trial of an accused charged with

3. Appendix C, p. 41.
4. Appendix A, p. 31.

violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. They do not try and they do not convict . . . Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all. Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one man grand jury may be, as Michigan holds, judicial in their nature, the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case."

The Supreme Court of Kansas, said in its opinion[5], in the instant cases:

"Petitioners stoutly contend the legislative history of the inquisition statute discloses it was not intended that the inquisition should be held in secret. We shall not burden the opinion with a lengthy discussion of the subject. There is nothing in the present statute which in anywise indicates a public hearing is contemplated. Proceedings before grand juries and similar investigative bodies seldom if ever have been conducted publicly. The reasons are clear . . . Constitutional provisions which require that an accused be permitted to meet witnesses face to face apply only to criminal prosecutions and not to mere investigative proceedings. Petitioners had not been accused of any crime."

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5. Appendix D, p. 54; Tr. p. 65-11.

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The Kansas Statute, G. S. 1949, 62-3016, under which the inquisition was conducted, provides in pertinent part, as follows:

> "A judge . . . may fine, or imprison any person for contempt on account of his refusal . . . to answer questions as a witness."

The above quoted portion of the statute clearly places any person subpoenaed to testify as a witness in an inquisition proceeding in the position of an accused, *upon his refusal to testify.* This point was urged upon the court below in petitioners' briefs and oral arguments, but the court ignored the transition of the status of petitioners from witnesses to accused in its opinion, and held that "Petitioners had not been accused of any crime."[7] The proceeding which resulted in the confinement of the petitioners was not only conducted in secrecy during their interrogation, but continued to be cloaked in secrecy after they refused to testify. No one, except the judicial and law enforcement officers present at the proceeding, had knowledge of the events which culminated in the convictions and commitments of the petitioners to jail. The petitioners stood alone before their inquisitors, accused of direct contempt, behind locked doors and in the presence only of officers of the court whose interests in the minds of the petitioners were inimically opposed to theirs, and were thus convicted and committed to jail.

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6. Appendix A, p. 32.
7. Appendix D, p. 55; Tr. p. 65-12.

In 14 Am. Jur. 864, Sec. 139, it is said:

> "The right to a public trial on a criminal charge is guaranteed by the Federal Constitution and by the Constitution of several states. The necessity for such a provision arose from abuses in England prior to the American Revolution, and its purpose manifestly is to protect the rights of a person accused of a crime, so that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their function."

In an English case, *Scott v. Scott*, 30 Ann. Cas. 1913 E 614, (1913) A. C. 417 (House of Lords, 1913), Lord Shaw, on this point, observed, *loc. cit.* p. 634:

> "It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial' . . . But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten! 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair construction of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain re-

> dress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy real freedom, where this condition is not found both in its judicial institution and in their constant exercise'."

The summary manner in which petitioners were convicted and the severity of the punishment inflicted raises the implication that the proceeding was punitive in character, rather than investigative. No opportunity to purge themselves of the alleged contempt was extended by the order committing petitioners to jail. Justice Smith, dissenting from the majority opinion of the Supreme Court of Kansas in the instant case[8], said:

> "A persuasive incident to me is that when these men were sentenced, in one case to three months, and in the other cases to a year in the county jail, the sentences were not in the alternative that they should purge themselves of contempt, but were direct sentences to that much of a term in the county jail.
>
> "The entire affair was punitive and not in the interest of obtaining evidence. Had the investigation been carried on in good faith the sentences would have been, petitioners should be confined in the county jail for the terms indicated or until they should purge themselves of contempt."

The question of whether the due process clause of the Fourteenth Amendment extended the provision of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . ." to apply to a trial of a criminal prosecution

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8. Appendix D, p. 63; Tr. p. 65—Dissent, p. 3.

by a state, was first raised in *Gaines v. State of Washington*, 277 U. S. 81, 72 L. Ed. 793, 48 S. Ct. 468 (1928). In considering the question, but not passing upon it, Chief Justice Taft said in his opinion, *loc. cit.* 85:

> "It is contended, however, that due process of law exacted in the Fourteenth Amendment in causes tried in state courts must be construed as equivalent to the Sixth Amendment in federal trials. The question has not arisen in any case cited to us. It would involve a consideration of whether due process requires more than a trial that is not private or secret, or whether due process would not be satisfied except by such a restriction upon the discretion of the court in regulating attendance as the defendant here insists upon and as is held in some of the authorities cited above in enforcing the Sixth Amendment and similar constitutional provisions of an affirmative character. But we need not pass on that question now."

The question was again before this court in *Re William Oliver, supra;* and in deciding it, Justice Black said, *loc. cit.* p. 273:

> "In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison."

It is respectfully submitted that, in view of the foregoing, petitioners were and are deprived of their liberty without the due process of law guaranteed to them by

the Fourteenth Amendment, by virtue of their accusation, trial, conviction and commitment to jail in secrecy. Certiorari should therefore issue to the Supreme Court of Kansas for the purpose of correcting the errors specified herein in the decree of that court denying the applications for writs of habeas corpus of the petitioners.

Point B.

Petitioners submit that the failure to afford them an *opportunity* to confer with counsel, or to defend themselves when they stood accused of direct contempt, or an opportunity to purge themselves after they were convicted, was a denial of the procedural due process of law guaranteed to them by the Fourteenth Amendment.

In its opinion[9] in the instant case, the Supreme Court of Kansas said:

> "Petitioners argue the sentences and commitments for direct contempt are invalid in that they violate constitutional and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel."

The opinion goes on to comment that petitioners failed to observe the distinction between indirect and direct contempt as provided by the statutes of Kansas, and cites G. S. 1949, 20-1203, which provides:

> "That a direct contempt may be punished summarily, without written accusation against the person arraigned, but if the court or judge in chambers

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9. Appendix D, p. 56; Tr. p. 65-14.

> shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon."

It should be noted that the statute above quoted contemplates an arraignment of the person accused of direct contempt. The arraignment of a prisoner consists of calling upon him by name, and demanding of him whether he be guilty or not guilty, and entering his plea, *Crain v. U. S.*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Black's Law Dictionary, 3rd Ed. p. 140. The record fails to disclose conformance by the judicial officer conducting the inquisition with the statute in that respect.

While an arraignment is a formal preliminary step to the trial of an accused, the minimum requisites of the trial to which an accused is entitled is a fair and open hearing, assistance of counsel, notice of the charge against him, and an opportunity to be heard in his defense, and it has been held these rights are fundamental in our system of jurisprudence. *Re William Oliver*, supra; p. 273; *Snyder v. Massachusetts*, 291 U. S. 97, p. 116, 54 S. Ct. 330, 78 L. Ed. 624, 90 A. L. R. 575; *Powell v. Alabama*, 287 U. S. 45, pp. 68-70, 53 S. Ct. 55, pp. 63, 64, 77 L. Ed. 158, 84 A. L. R. 527; *Morgan v. U. S.*, 304 U. S. 1, pp. 14, 15, 58 S. Ct. 773, pp. 774, 775, 82 L. Ed. 1129, and cases therein cited.

In the instant case the Supreme Court of Kansas, in its opinion held that direct contempts pursuant to the

quoted section of the statute, might properly be treated *summarily*. It was said[10]:

> "Here we are concerned only with direct contempt of court committed in the presence of the presiding judge who had personal knowledge of exactly what transpired."

As authority for the ruling the court below cited *Savin, Petitioner*, 131 U. S. 267, 33 L. E. 150, 9 S. Ct. 699; and *Cooke v. United States*, 267 U. S. 517, 69 L. ed. 767, 45 S. Ct. 390. In both of the cited cases the contemner was proceeded against *in open court*. In the *Savin* case, the accused was represented by counsel. In the *Cooke* case, the accused was an attorney practicing before the court. In the latter case, this court said, *loc. cit.* 537:

> "The court in Savin, Petitioner, . . . applied this rule to proceedings for contempt.
>
> "Due process of law, therefore, in the prosecution of contempt, except of that committed in *open court*, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. *We think this includes the assistance of counsel, if requested*, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed . . . " (Emphasis supplied.)

In *Re William Oliver, supra*, this Court discussing the earlier case of *Ex parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405, said, loc. cit. 274:

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10. Appendix D, p. 58; Tr. p. 65-16.

> "It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. Ex parte Terry . . . was such a case. There Terry committed an assault on the marshal who was at the moment removing a heckler from the courtroom. The 'violence and misconduct' of both the heckler and the marshal's assailant occurred within the 'personal view' of the judge, 'under his own eye', and actually interrupted the trial of a cause there under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing . . . This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by immediate punishment. However, this court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court disrupting misconduct which alone justified its exercise. Indeed in the Terry case the Court cited with approval its decision in Anderson v. Dunn, 6 Wheat 204, 5 L. Ed. 242, which had marked the limits of contempt authority in general as being "the least possible power adequate to the end proposed."

It is submitted that in the instant cases the direct contempt for which the petitioners were committed summarily to jail was not in open court, nor did the alleged contemptuous conduct disrupt or demoralize the court, if the inquisition proceeding may be properly styled a "court". It cannot be denied that at the time petitioners were warned that their continued refusal to testify would result in punishment for con-

tempt, they were without counsel, as the record clearly shows that all of them objected to testifying without counsel (Tr. pp. 20-2, 22-11A). The record also discloses that at least one of the petitioners had counsel available, as a letter from such counsel was presented to the officials conducting the inquisition (Tr. pp. 22-2, 18-Ex. "A"). It may be fairly inferred from those facts that counsel for petitioners were denied access to the inquisition proceeding. It is undisputed that counsel were not present when petitioners were summarily sentenced to jail. Had petitioners been allowed to confer with counsel at an arraignment preliminary to their trial and sentence, and receive advice as to the possible consequences of their continued refusal to testify, by counsel of their choice, they might well have purged themselves of the alleged contempt, or at least offered explanations in mitigation of their offenses. No such opportunity was afforded the petitioners, nor were their sentences conditioned upon the withdrawal of their refusals to testify, after they might have had an opportunity to confer with counsel. As Justice Smith said in his dissent, "The entire affair was punitive . . . "[11].

The Supreme Court of Kansas, in its opinion[12] with reference to petitioners' contention that they were deprived of counsel, said:

> "Petitioners assert the inquisition as conducted violated the fifth, sixth and fourteenth amendments

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11. See p. 15, ante.
12. Appendix D, p. 51; Tr. p. 65-7.

to the federal constitution and section ten of the Kansas bill of rights.

"• • • • •

"The Sixth Amendment, insofar as material, provides: 'In all *criminal prosecutions,* the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense. (Our italics.)'

"The essential part of the fourteenth amendment states: ' . . . No state shall make or enforce any law which shall *abridge the privileges and immunities* of any citizen of the United States; nor shall any state deprive any person of life, liberty or property, *without due process of law.* (Our italics.)'

"• • • • •

"Petitioners contend they were deprived of counsel in contravention of the sixth amendment to the federal constitution. From an examination of the record it well may be debatable whether any of them actually demanded or requested counsel. They did, however, object to testifying on the ground they were without counsel. We have indicated previously (1) the sixth amendment does not apply to state statutes and (2) this inquisition was a preliminary investigative proceeding to uncover crime and was not a criminal prosecution.

"It is well settled an investigation of crime by a grand jury is not a criminal prosecution . . . This court has likewise held a preliminary hearing in a felony case does not fall within the definition of a criminal prosecution and that absent a statutory requirement, a defendant's rights are not invaded without the appointment of counsel for such hearing . . . "

The court below apparently dismissed petitioners' contentions with respect to the denial of counsel on the

following grounds; first, there had been no demand or request for counsel; second (after petitioners objected to testifying without counsel), the Sixth Amendment does not apply to state statutes; third, the inquisition proceeding was investigative and not a criminal prosecution; fourth, a preliminary hearing in a felony case is not a criminal prosecution; and fifth, a defendant's rights are not invaded absent the appointment of counsel for a preliminary hearing in a felony case.

It may be fairly argued that the grounds above recited are contradictory and irrelevant. The first basis for disregarding petitioners' contention is negated by the reference to petitioners' objection in the second; the second ground does not take into consideration the application of the due process clause of the Fourteenth Amendment; the third ground ignores the undisputed fact that petitioners were convicted of an offense and sentenced to jail; the fourth is entirely irrelevant; and the fifth presupposes, apparently, a *request to appoint* counsel by petitioners. As stated previously, petitioners had counsel of their own choice ready and willing to assist them, as evidenced by the letter of counsel[13] previously referred to.

In the *Oliver* case, *supra*, this court said, *loc. cit.*, p. 275:

> "Except for a narrowly limited category of contempts, due process of law requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel . . . The narrow exception to these due process requirements in-

13. See p. 21, ante.

> cludes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eyes of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority . . . before the public'.
>
> " • • • • • •
>
> "The facts shown by this record put this case outside the narrow category of cases that can be punished as contempt without notice hearing and counsel. Since the petitioner's misconduct all occurred in secret there could be no possibility of a demoralization of the court's authority before the public . . ."

In all fairness it must be admitted that in the instant cases all of the elements of the offense were personally observed by the judge-inquisitor. However, it can be fairly argued that while the offense might be punishable as contempt by that officer in his capacity as judge in open court, to punish for contempt in a secret inquisition proceeding is an unlawful exercise of power by the inquisitor.

The Supreme Court of Kansas in the instant case repeatedly equated the inquisition proceeding to a grand jury investigation.[14] This court in the *Oliver* case, *supra*, said at pages 277, 278:

> "The traditional grand juries have never punished contempts. The practice that has always been followed with recalcitrant grand jury witnesses is to take them into open court, and that practice, consistent with due process, has not demoralized the authority of the courts . . . The right to be heard

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14. Appendix D, pp. 52, 54; Tr. pp. 65-9, 65-11.

in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority'.

"It is the law of the land that no man's life, liberty or property be forfeited as punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chambers v. Florida, 309 U. S. 227, 236, 237, 60 S. Ct. 472, 477, 84 L. Ed. 716 . . . ."

It is submitted that the entire inquisition proceeding at which petitioners were convicted and sentenced to jail was so permeated with illegality that such convictions cannot be allowed to stand. The petitioners were deprived of their liberty without regard for the procedural due process of law guaranteed to them by the Constitution of the United States, in a proceeding repugnant to the ideas and processes of civil justice. The inquisition proceeding of Kansas, and the "one man grand jury" of Michigan, have been declared lawful by the highest courts of both jurisdictions; both procedures circumscribe the historical institution of the common-law grand jury. The limitation of that ancient institution is generally justified for reasons of economy and expediency. However, in Kansas, at least, the grand jury had always been available in a proper case, and prior to the instant decision, had been understood to be the proper agency to exercise general inquisitorial and investigative powers. As such, it constituted a method of discovery available to law enforcement officers, while giving co-extensive protection from unfounded and unjust accusations to the private citizen. Our ancestors were rightfully concerned with

that protection, and the institution of the grand jury was its principal bulwark. In 24 Am. Jur. 833, sec. 3, it is said:

> "The grand jury is of very ancient origin in the history of England going back many centuries . . . the grand jury was, at the time of the settlement of this country, an informing and accusing tribunal only . . . In the struggles which at those times arose between the powers of the King and the rights of the subject, it often stood as a barrier against persecution in his name, until at length it came to be regarded as an institution by which the subject was rendered secure against the oppression of unfounded prosecutions of the Crown . . . the grand jury was adopted here . . . and is designed as a means not only of bringing to trial persons accused of offenses upon just grounds, but also of protecting the citizens against unfounded accusation. Whether they come from the government or are prompted by partisan passion or private enmity."

In *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, this court has employed language indicative of the repugnance of dictatorial criminal procedure to the constitutional guaranties of procedural due process. At page 235, in the opinion by Justice Black, it was said:

> " . . . The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect at all times, people charged with or suspected of a crime, by those holding positions of power and authority. Tyrannical

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governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny . . . a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already 'by the law of the land forbidden' when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement . . . evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country . . . wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberty and property of people accused of a crime can only follow if procedural safeguards of due process have been obeyed.

"The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes . . . "

It is true that the language above quoted was taken from context of a land-mark opinion which dealt with the lives of four men. Whereas, in the instant matter we are concerned only with the deprivation of the liberty of the petitioners for relatively short periods of time in a fairly well-managed county jail. However, it is submitted that the language used in *Chambers v. Florida,* supra, could be applied with equal force and pertinency to the situation of the petitioners.

It is earnestly submitted that the denial of assistance of counsel to the petitioners when they stood accused of direct contempt of the judge-inquisitor, after their refusal to testify without counsel, was violative of the procedural due process required by the Fourteenth Amendment. The Supreme Court of Kansas suggested in its opinion that it was debatable whether petitioners demanded or requested counsel. It has already been pointed out that that suggestion is not consonant with the record.[15] Petitioners suggest that the speed with which the inquisition was transformed into a criminal prosecution, and the disregard of ordinary criminal procedure, did not permit petitioners to present a formal demand and request for the assistance of counsel prior to their sentences and commitment to jail.[16] That the right to assistance of counsel is a fundamental element of procedural due process was first determined by this Court in the case of *Powell v. Alabama, supra,* in its opinion delivered by Sutherland, J., wherein it was said, *loc. cit.* p. 67:

> " . . . While the question has never been categorically determined by this court, a consideration of the right and review of the expressions of this and other courts makes it clear that the right to aid of counsel is of this fundamental character."

It is emphasized that petitioners do not complain that the judge-inquisitor refused to appoint counsel for their assistance. The complaint is that they were denied counsel of their choice who were ready and willing to assist

15. See page 21, ante.
16. Transcript of the record, pp. 20-7, 21-55, 22-11A.

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them.[17] See *Betts v. Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252. Petitioners contend that the denial of assistance of counsel to persons accused of a criminal offense, where such persons desire counsel and are prepared to provide counsel, is a denial of procedural due process of law. See *Powell v. Alabama*, supra; *Grosjean v. American Press Co.*, 297 U. S. 233, 243, 244, 56 S. Ct. 444, 446, 80 L. Ed. 660; *Brown v. Mississippi*, 297 U. S. 286, 56 S. Ct. 663, 80 L. Ed. 687.

CONCLUSION.

It is submitted that the accusation of contempt, trial, conviction, sentence, and commitment to jail of the petitioners, in a secret inquisition proceeding by a judge-inquisitor, without hearing, counsel or an opportunity to purge themselves of such contempt, constituted a denial to the petitioners of procedural due process of law as contemplated by the Fourteenth Amendment to the Constitution of the United States.

It is further submitted that the Supreme Court of the State of Kansas erroneously denied the applications of the petitioners for writs of habeas corpus, and erroneously ruled upon the rights, privileges and immunities conferred upon the petitioners by the Constitution of the United States, and raised by them in their said applications and upon the hearings thereof.

It is therefore respectfully submitted that these cases call for the exercise by this Court of its supervisory powers, by granting writ of certiorari and thereafter re-

17. See page 21, ante.

viewing and reversing the decision of the said Supreme Court of the State of Kansas.

Dated_____

_____Attorney for Petitioners.

PAYNE H. RATNER,
444 North Market,
Wichita, Kansas.

Service on counsel for respondent of a copy of above brief is hereby acknowledged this_____day of _____, 1954.

_____Attorney for Respondent.

APPENDIX A.

Chap. 62, G. S., 1949, Kan.

"Article 3. — INQUISITIONS IN CRIMINAL CASES.

"Cross references: Fugitives from justice, see ch. 62 art. 7. Combinations in restraint of trade, see Secs. 50-109, 50-110, 50-153 to 50-156.

"62-301. *Inquisitions; subpoena of witnesses; penalty for disobedience; immunity of witnesses.* If a county attorney, attorney general, or assistant attorney general shall be notified by any officer or other person, or shall have knowledge of any violation of any law of this state relating to gambling, intoxicating liquors, or of any violation of any law where the accused is a fugitive from justice, it shall be his duty forthwith diligently to inquire into the facts of such offense, and for that purpose he is hereby authorized to issue subpoenas for such persons as he shall have any reason to believe have any information concerning, or knowledge of such offense, to appear before him, at a time and place to be designated in the subpoena, then and there to testify concerning any offense against the laws of the state; or said county attorney, attorney general or assistant attorney general may file with the judge of the district court, a judge of the city court, or with some justice of the peace of the county, a written statement signed by him, alleging any offense against the laws of this state and such judge or justice of the peace shall, on the written praecipe of the county attorney, attorney general or assistant attorney general, issue a subpoena for the witnesses named in such praecipe, commanding such witnesses to be and appear before such judge or justice of the peace at the time stated in such subpoena, to testify concerning any offense against the laws of the state. Such subpoena may be served by the sheriff or any constable of the county, or by any other person, a citizen of the county,

and shall be served and returned to such county attorney, attorney general, assistant attorney general, judge or justice of the peace, in the same manner subpoenas are served and returned when issued by justices of the peace. Each witness shall be sworn, true answers to make to all questions propounded to him touching the matter of information, and the testimony of each witness shall be reduced to writing and signed by the witness; for the purpose herein the county attorney, attorney general and assistant attorney general are authorized and empowered to administer oaths and affirmations to such witnesses. Any disobedience to the subpoena of the county attorney, attorney general, assistant attorney general, judge or justice of the peace, or any refusal to be sworn as a witness or to sign the testimony given by him, or any refusal to answer any proper questions propounded by the county attorney, attorney general or assistant attorney general, in such inquiry, shall be a misdemeanor and shall be punished by a fine of not more than $300 or be imprisoned in the county jail for not more than ninety days, or by both such fine and imprisonment. Such officers, while so acting as aforesaid, shall have the power to adjourn such proceedings from time to time. A judge or justice of the peace may fine and imprison any person for contempt on account of his refusal to be sworn or to answer questions as a witness, or to sign the testimony; and the attendance of witnesses may be by such judge or justice of the peace compelled by attachment. If the testimony so taken shall disclose the fact that an offense has been committed, such county attorney, attorney general or assistant attorney general shall prosecute the person or persons committing such offense and may file such testimony, together with his complaint or information, against such person or persons in some court of competent jurisdiction, and such testimony, with the information or complaint of the county attorney, attorney general or assistant attorney

general, verified by him on information and belief, shall have the same effect as if such information or complaint had been verified positively; and thereupon a warrant shall be issued for the arrest of such person or persons as in other criminal cases. No person shall be excused from testifying in any proceeding as above provided on the ground that his testimony may incriminate him; but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify, nor shall such testimony be used against him in any prosecution for any crime or misdemeanor under the laws of this state. (R. S. 1923, s 62-301; Dec. 27.)

APPENDIX B.

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION OF PHILLIP T. FERRIS FOR A WRIT OF HABEAS CORPUS. CASE No. 39454

STATE OF KANSAS)
) SS:
SEDGWICK COUNTY)

To the Supreme Court of the State of Kansas:

Your petitioner, Phillip T. Ferris, respectfully represents that he is unlawfully deprived of his liberty by Ty Lockett, Sheriff of Sedgwick County, Kansas, at Wichita, in Sedgwick County, in the State, and that the cause of pretense of his restraint, according to his best knowledge and belief, is as follows:

That on or about January 18, 1954, your petitioner was arrested under authority of a bench warrant, or an order of attachment, issued by the District Court of Sedgwick County, Kansas.

That your petitioner was confined in the Sedgwick County Jail, under the authority of the said bench warrant or order of attachment for a period of hours, after which period and at or about 5:30 p. m. of said day, petitioner was removed from the said Sedgwick County Jail and brought before Judge Howard C. Kline, Judge of Division 2 of the District Court of Sedgwick County, Kansas, whereupon your petitioner was interrogated by one Paul R. Kitch, a special deputy County Attorney of the said county, after first being sworn upon oath. Upon your petitioner's refusal to answer certain questions propounded by the said special County Attorney, the interrogation was continued by the said Judge. Upon your petitioner's refusal to answer certain questions propounded by the said Judge, the petitioner was sentenced to be confined in the County Jail of Sedgwick County,

Kansas, for the period of one year for contempt of the said Court, and was delivered into the custody of the said Ty Lockett, Sheriff of Sedgwick County, Kansas, and confined in the said County Jail.

Your petitioner represents and shows to the Court that his said restraint is illegal in this, to-wit:

I. That your petitioner was arrested under process issuing from Division 2 of the District Court of Sedgwick County, Kansas, in the Matter of an Inquisition to Inquire Into Certain Violations of the Laws of the State of Kansas, Case No. A-48004, and was interrogated in said inquisition, and committed to the said County Jail for contempt of Court upon his refusal to answer certain questions propounded by a special deputy County Attorney and the Judge of said District Court.

II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons unauthorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.

III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas.

WHEREFORE, your petitioner prays that a writ of habeas corpus may be issued, that he may be discharged from said unlawful imprisonment.

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION OF CECIL L. COURTNEY FOR A WRIT OF HABEAS CORPUS. CASE No. 39455

STATE OF KANSAS)
) SS:
SEDGWICK COUNTY)

To the Supreme Court of the State of Kansas:

Your petitioner, Cecil L. Courtney, respectfully represents that he is unlawfully deprived of his liberty by Ty Lockett, Sheriff of Sedgwick County, Kansas, at Wichita, in Sedgwick County, in the State, and that the cause or pretense of his restraint, according to his best knowledge and belief, is as follows:

That on or about January 18, 1954, your petitioner was arrested under authority of a bench warrant, or an order of attachment, issued by the District Court of Sedgwick County, Kansas.

That your petitioner was confined in the Sedgwick County Jail, under the authority of the said bench warrant, or order of attachment for a period of hours, after which period and at or about 5:30 p. m. of said day, petitioner was removed from the said Sedgwick County Jail and brought before Judge Howard C. Kline, Judge of Division 2 of the District Court of Sedgwick County, Kansas, whereupon your petitioner was interrogated by one Paul R. Kitch, a special deputy County Attorney of the said county, after first being sworn upon oath. Upon your petitioner's refusal to answer certain questions propounded by the said special County Attorney, the interrogation was continued by the said Judge. Upon your petitioner's refusal to answer certain questions pro-

pounded by the said Judge, your petitioner was sentenced to be confined in the County Jail of Sedgwick County, Kansas, for the period of one year* for contempt of the said Court, and was delivered into the custody of the said Ty Lockett, Sheriff of Sedgwick County, Kansas, and confined in the said County Jail.

* Errata in original application. Courtney was actually sentenced to 90 days.

Your petitioner represents and shows to the Court that his said restraint is illegal in this, to-wit:

I. That your petitioner was arrested under process issuing from Division 2 of the District Court of Sedgwick County, Kansas, In the Matter of an Inquisition to Inquire Into Certain Violations of the Laws of the State of Kansas, Case No. A-48004, and was interrogated in said inquisition, and committed to the said County Jail for contempt of Court upon his refusal to answer certain questions propounded by a special deputy County Attorney and the Judge of said District Court.

II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons unauthorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.

III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify

to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas.

WHEREFORE, Your petitioner prays that a writ of habeas corpus may be issued, that he may be discharged from said unlawful imprisonment.

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION OF RAY PARKS FOR A WRIT OF HABEAS CORPUS — CASE NO. 39459

APPLICATION FOR WRIT OF HABEAS CORPUS

STATE OF KANSAS)
) SS
SEDGWICK COUNTY)

To the Supreme Court of the State of Kansas:

Your petitioner, Ray Parks, respectfully represents that he is unlawfully deprived of his liberty by Ty Lockett, Sheriff of Sedgwick County, Kansas, at Wichita, in Sedgwick County, in the State, and that the cause or pretense of his restraint, according to his best knowledge and belief, is as follows:

That on or about January 19, 1954, your petitioner was served with a forthwith subpoena issued by the District Court of Sedgwick County, Kansas, and was bodily taken by the servers thereof to the office of the County Attorney of Sedgwick County, Kansas, and was there held from the approximate time of 3:30 p. m. on said date until approximately 10 p. m., on said date, at which time petitioner was released and instructed by Judge Howard C. Kline, Judge of Division 2 of the District Court of Sedgwick County, Kansas, to return to said court at 5:30 p. m. on January 20, 1954. That your petiitoner did appear be-

fore said Judge at said time and place and was held in the office of the County Attorney of Sedgwick County, Kansas, until approximately 6:30 p. m., on said 20th day of January, 1954, at which time your petitioner was brought before Judge Howard C. Kline, Judge of Division 2, of said District Court of Sedgwick County, Kansas, whereupon your petitioner was interrogated by one Paul R. Kitch, a special Deputy County Attorney of said County, after first being sworn upon oath. Upon your petitioner's refusal to answer questions propounded by said special County Attorney, interrogation was continued by the said Judge. Upon your petitioner's refusal to answer questions propounded by said Judge, your petitioner was sentenced to be confined in the County Jail of Sedgwick County, Kansas, for a period of one year for contempt of the said court, and was held in the office of the County Attorney of said County until approximately 7:30 p. m., on January 20, 1954, at which time your petitioner was delivered into the custody of Ty Lockett, Sheriff of Sedgwick County, Kansas, and confined in the County Jail of said county.

Your petitioner represents and shows to the Court that his said restraint is illegal in this, to-wit:

I. That your petitioner was subpoenaed under process issuing from Division 2 of the District Court of Sedgwick County, Kansas, In the Matter of an Inquisition to Inquire Into Certain Violations of the Laws of the State of Kansas, Case No. A-48004, and was interrogated in said inquisition, and committed to the said County Jail for contempt of Court upon his refusal to answer certain questions propounded by a special Deputy County Attorney and the Judge of said District Court.

II. Your petitioner further shows this court that the said District Court before which the said inquisition was and is being conducted has exceeded the authority conferred upon it by G. S. 1949, 62-301, by conducting said inquisition in secret and by denying your petitioner the right to confer with counsel, and by allowing persons un-

authorized by law to participate in said inquisition; and said District Court was therefore without jurisdiction to render the judgment under which your petitioner was committed to the said County Jail.

III. Your petitioner further represents and shows to the court that timely and pertinent objections were made to the questions propounded at said inquisition upon the grounds said questions contravened rights guaranteed to your petitioner by the Fifth and Fourteenth Amendments to the Constitution of the United States; that the interrogators sought to compel your petitioner to testify to matters which would incriminate or tend to incriminate him under penal laws of the United States; that your petitioner has been deprived of his liberty without due process of law and has been denied the equal protection of the laws of the State of Kansas.

IV. That your petitioner, although requesting permission to have advice of counsel, was denied by said Judge the right to counsel at all stages of said proceeding prior to petitioner's being found in contempt of said court as hereinbefore stated.

WHEREFORE, your petitioner prays that a writ of habeas corpus may be issued, that he may be discharged from said unlawful imprisonment.

APPENDIX C.

THE COMPILED LAWS OF THE STATE OF MICHIGAN, 1929

Chapter VII

Grand Juries, Indictments, Informations and Proceedings before Trial.

* * * * *

17217 Proceedings before Trial; summoning witness, inquiry, compensation. Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

* * * * *

17218 Same; apprehension of suspected person, finding, disclosure of statement. Sec. 4. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process

served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or public body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

* * * * *

APPENDIX D.

Advance Sheets of The Kansas Reports, Vol. 175, No. 5, pp. 704-719.

"No. 39,454

In the Matter of the Application of Philip T. Ferris for a Writ of Habeas Corpus, *Petitioner*, v. Ty Lockett, Sheriff of Sedgwick County, *Respondent*.

No. 39,455

In the Matter of the Application of Cecil L. Courtney for a Writ of Habeas Corpus, *Petitioner*, v. Ty Lockett, Sheriff of Sedgwick County, *Respondent*.

No. 39,459

In the Matter of the Application of Ray Parks for a Writ of Habeas Corpus, *Petitioner*, v. Ty Lockett, Sheriff of Sedgwick County, *Respondent*.

SYLLABUS BY THE COURT

1. *STATUTES — Construction — Legislative Purpose.* In interpreting a statute separate portions thereof may not be isolated and considered separately but all of its provisions must be considered together with a view of ascertaining the over-all legislative intent and purpose with respect to every provision.

2. *INQUISITIONS—Scope and Purview of Statute—Statute Construed.* G. S. 1949, 62-301 interpreted and held: It was not the legislative intent and purpose to limit the scope and purview of a judicial inquisition, conducted on request of and by the county attorney before the district court, to violations of law relating only to gambling, intoxicating liquors, or to violations of any law where the accused is a fugitive from justice, but its intent was that when the inquisition was conducted as a judicial proceeding rather than one by the county attorney, attorney general, or assistant attorney general, then inquiry could be made relative to "any offense against the laws of the state."

3. *SAME — Judicial Inquisition Not Criminal Prosecution—Purpose.* An inquisition authorized and conducted as a judicial proceeding in accordance with provisions of G. S. 1949, 62-301, is not a criminal prosecution in the constitutional, or statutory, sense but an investigative proceeding designed only to obtain evidence of crimes committed against the laws of this state with a view of punishing the offenders.

4. *WITNESSES — Constitutional Privilege.* The constitutional privilege that a person shall not be required to be a witness against himself is of great value to a citizen when accused of crime and it should be carefully guarded for his protection.

5. *SAME—Immunity from Prosecution—Power of Legislature.* Legislatures possess the power to grant immunity from criminal prosecution under state laws to witnesses who are required to testify concerning violations thereof. Such power is recognized as a public necessity in the enforcement of laws for the protection of society as a whole.

6. *INQUISITION — Granting Immunity—Necessity for Witness to Testify.* When immunity from criminal prosecution has been guaranteed to a citizen relative to evidence he might give in a legally constituted inquisitorial proceeding he may no longer insist on remaining silent on the ground his testimony might incriminate or tend to incriminate, him, the reason being the immunity leaves him in the same position as though there were no laws which make his acts a crime.

7. *WITNESSES—Granting Immunity from Prosecution for Violation of State Law—Lack of Federal Immunity No Excuse to Testify.* Upon being granted immunity from prosecution for the violation of state laws a witness in a legally constituted inquisition ordinarily may not refuse to testify on the ground amnesty from prosecution for violation of federal laws has not been guaranteed and this is the universal rule

where inquiry is being made only of violations of state laws.

8. *CONSTITUTIONAL LAW — Effect of Federal Amendments on State Powers.* The first ten amendments to the federal constitution operate on the national government only. They were not intended to, and do not, limit the powers of the states in respect to their own people.

9. *INQUISITION — Refusal to Testify — Punishment.* When punishment has not been imposed on witnesses under the penal provisions of an inquisition statute for refusal to testify but only under the provisions thereof expressly authorizing punishment for contempt of court, the validity of the penal provisions is not involved in a habeas corpus proceeding instituted by such witnesses seeking release from custody.

10. *COUNTIES—Power of County Commissioners—Employment of Additional Counsel.* A board of county commissioners is empowered to employ legal counsel to assist the county attorney in the performance of his duties, in civil or criminal cases, when in its judgment it becomes necessary or expedient to do so.

11. *HABEAS CORPUS—Refusal to Testify in Inquisitional Proceedings—Contempt—No Constitutional or Statutory Rights Violated.* The official records in three original habeas corpus proceedings examined, considered and held, they disclose no conduct which contravenes the rights of petitioners under the fifth, sixth or fourteenth amendments to the federal constitution or of section ten of our state bill of rights; and further held, the sentences pronounced and the commitments issued for direct contempt do not violate any statutes of this state.

Original proceedings in habeas corpus. Opinion filed March 3, 1954. Writs denied. 45-175 Kan.

Payne H. Ratner, of Wichita, argued the cause, and *Louise Mattox, Payne H. Ratner, Jr., Russell Cranmer,*

Dale B. Stinson, Jr., Starr Calvert, Jr., Carroll Pope, and *Keith Eales,* all of Wichita, were with him on the briefs for the petitioners.

Warner Moore, county attorney, and *Paul R. Kitch,* of Wichita, argued the cause, and *Manford Holly, Charles D. Anderson, Dale M. Stucky,* and *Donald R. Newkirk,* all of Wichita, were with them on the briefs for the respondent.

Harold R. Fatzer, attorney general, *Paul E. Wilson,* assistant attorney general, and *Roy Kirby,* of Coffeyville, were on the briefs amicus curiae.

The opinion of the court was delivered by

Wedell, J.: Three original habeas corpus proceedings have been consolidated upon request of the parties. The petitioners are Cecil L. Courtney in case No. 39,455, Philip T. Ferris in case No. 39,454, and Ray Parks in case No. 39,459.

An inquisition was conducted in the district court of Sedgwick county upon request of the Sedgwick county attorney to make inquiry into certain offenses against the laws of the state of Kansas. His request for the inquisition was based on alleged damage to and destruction of real and personal property by use of paint bombs, fire bombs and fluid bombs and assaults and battery in connection with a taxicab strike in Wichita, by persons whose names were unknown to him. The purpose of the requested inquisition was the prevention of similar further occurrences and to determine the names of the guilty parties in order that they might be punished for violation of the laws of Kansas.

In the inquisition petitioners were guaranteed immunity from prosecution for the violation of any state laws concerning which they might testify. They were informed the guarantee of immunity did not include immunity from prosecution for perjury if committed by them in the course of the inquiry.

Petitioners were sentenced to serve terms of imprisonment in the county jail for direct contempt of court by reason of their refusal to answer certain questions propounded to them during the investigative proceedings.

It is conceded that for all practical purposes the petitions for the writ are identical, except as to parties, insofar as alleged grounds for release from custody are concerned. The alleged illegality of their sentences and commitments, recited in the petitions, will be considered under their respective contentions.

We pause to state petitioners' motions to strike certain paragraphs of respondent's answers have been examined. If the matters petitioners seek to have stricken from the answers "do not add or detract from the issues," as their motions state, such allegations can hardly be characterized as prejudicial. In that respect the exhibits attached to defendant's answer are quite similar to those attached to petitioners' replies. In any event we agree with counsel for petitioners that some of the matters sought to be stricken are not entirely germane to the legal issues before us. They do, however, disclose some of the background which prompted the request for the inquisition and to that extent they are pertinent.

This court is in nowise presently concerned with the cause or causes of the strike or with attaching blame therefor. Nor is it our present function to intimate even remotely who may or may not be guilty of violating any criminal laws of this state. Those subjects are all entirely foreign to any issue now before us. The sole question to which we now are required to address our attention is whether petitioners, irrespective of the group or organization to which they may belong, if any, have been deprived of their liberty in contravention of their constitutional privileges and guarantees or other legal rights. The first question is does G. S. 1949, 62-301 authorize this investigative proceeding? It reads:

'If a county attorney, attorney general, or assistant attorney general shall be notified by any officer or other

person, or shall have knowledge of any violation of any law of this state relating to gambling, intoxicating liquors, or of any violation of any law where the accused is a fugitive from justice, it shall be his duty forthwith diligently to inquire into the facts of such offense, and for that purpose he is hereby authorized to issue subpoenas for such persons as he shall have any reason to believe have any information concerning, or knowledge of such offense, to appear before him at a time and place to be designated in the subpoena, then and there to testify concerning any offense against the laws of the state; *or said county attorney, attorney general or assistant attorney general may file with the judge of the district court, a judge of the city court, or with some justice of the peace of the county, a written statement signed by him, alleging any offense against the laws of this state and such judge or justice of the peace shall, on the written praecipe of the county attorney, attorney general or assistant attorney general, issue a subpoena for the witnesses named in such praecipe, commanding such witnesses to be and appear before such judge or justice of the peace at the time stated in such subpoena, to testify concerning any offense against the laws of the state.* Such subpoena may be served by the sheriff or any constable of the county, or by any other person, a citizen of the county, and shall be served and returned to such county attorney, attorney general, assistant attorney general, judge or justice of the peace, in the same manner subpoenas are served and returned when issued by justices of the peace. Each witness shall be sworn, true answers to make to all questions propounded to him touching the matter of information, and the testimony of each witness shall be reduced to writing and signed by the witness; for the purpose herein the county attorney, attorney general and assistant attorney general are authorized and empowered to administer oaths and affirmations to such witnesses. *Any disobedience to the subpoena of the county attorney, attorney general, assistant attorney general, judge or justice of the peace, or*

any refusal to answer any proper questions propounded by the county attorney, attorney general or assistant attorney general, in such inquiry, shall be a misdemeanor and shall be punished by a fine of not more than $300 or be imprisoned in the county jail for not more than ninety days, or by both such fine and imprisonment. Such officers, while so acting as aforesaid, shall have the power to adjourn such proceedings from time to time. *A judge or justice of the peace may fine and imprison any person for contempt on account of his refusal to be sworn or to answer questions as a witness, or to sign the testimony; and the attendance of witnesses may be by such judge or justice of the peace compelled by attachment.* If the testimony so taken shall disclose the fact that an offense has been committed, such county attorney, attorney general or assistant attorney general shall prosecute the person or persons committing such offense and may file such testimony, together with his complaint or information, against such person or persons in some court of competent jurisdiction, and such testimony, with the information or complaint of the county attorney, attorney general or assistant attorney general, verified by him on information and belief, shall have the same effect as if such information or complaint had been verified positively; and thereupon a warrant shall be issued for the arrest of such person or persons as in other criminal cases. *No person shall be excused from testifying in any proceeding as above provided on the ground that his testimony may incriminate him; but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify, nor shall such testimony be used against him in any prosecution for any crime or misdemeanor under the laws of this state.'* (Our italics.)

Counsel for petitioners, with commendable frankness, concede that at the time of the inquiry they believed the inquisition was "entirely legal" but that it was conducted in an illegal manner in certain particulars, which

will be stated later. They now state the inquisition was wholly illegal and that the above statute does not authorize it. These are original proceedings in this court. Fundamental rights pertaining to the liberty of citizens are involved and the court is not inclined to rest its decision on technicalities. We shall fully consider petitioners' contentions as now made. This requires first a careful analysis of the above statute.

Petitioners contend the first part of the statute, prior to the first italicized portion thereof, limits the scope and purview of inquiry to acts connected with the three specific classes of offenses therein designated. We believe such a construction of the statute does violence to its declared intent and purpose. The portion of the statute on which petitioners rely does pertain to an investigation concerning the three subjects specified, by and before the law enforcement officers therein designated. That, however, is only one portion of the statute. Beginning with the first italicized portion the legislature clearly broadened the extent of inquisitorial powers to include *judicial proceedings* before the district judge, a judge of the city court or justice of the peace. As to judicial proceedings it clearly broadened the scope of an inquisition to include "any offense against the laws of the state." It further empowered such judicial officers to issue subpoenas to witnesses to appear and testify before them. The instant proceedings were all conducted pursuant to the latter part of the statute which pertains to judicial inquisitorial proceedings. Those proceedings included a written statement made by the county attorney to the district court, the issuance of subpoenas by the district court and the hearings before such court.

Under the first part of the statute a refusal to answer proper questions before the officers designated, of course, is not declared to constitute contempt. The right to punish for contempt is expressly limited to a judge or justice of the peace. Moreover, it is well established that district courts of this state, independent of statute,

have inherent power to punish for contempt and to make such reasonable orders as are necessary to protect and preserve their judgments. (*State v. Coleman*, 168 Kan. 159, 211 P. 2d 81.) Careful analysis of the entire statute, which is always required to determine legislative intent, clearly indicates an intent to provide two separate and distinct inquisitorial or investigative proceedings which may be employed. The first pertains only to a violation of specific laws mentioned in the first part of the statute and by the officers there named. The other applies to a violation of any state law and a judicial inquiry. We, therefore, are obliged to conclude counsel for petitioners were correct in their first impression that the inquisition itself was "entirely legal."

We shall next consider petitioners' contention the inquisition, as conducted, violated their constitutional guarantees and other legal rights. If that be true petitioners should be promptly released from custody. That is the beneficent purpose of the ancient writ of habeas corpus. That such a sacred right should be most carefully guarded for the protection of the citizen against autocratic power is not debatable under a government dedicated to protect the rights of its people. Can a citizen under a government ordained to protect not only him, but all citizens, from crimes against persons or property refuse to testify when his government calls on him to assist in investigating crimes for the protection of society as a whole? That question, under constitutional guarantees, cannot be answered in the affirmative without definite qualifications.

Petitioners assert the inquisition, as conducted, violated the fifth, sixth and fourteenth amendments to the federal constitution and section ten of the Kansas bill of rights.

The pertinent portion of the fifth amendment reads:

'No person shall be . . . compelled *in any criminal case* to be a witness against himself, nor be deprived of

life, liberty, or property, *without due process of law* . . . " (Our italics.)

The sixth amendment, insofar as material, provides:

'In all *criminal prosecutions,* the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.' (Our italics.)

The essential part of the fourteenth amendment states:

' . . . No State shall make or enforce any law which shall *abridge the privileges or immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property *without due process of law.* . . . ' (Our italics.)

The material portion of section ten of our bill of rights recites:

'*In all prosecutions,* the accused shall be allowed to appear and defend in person, or by counsel . . . *No person shall be a witness against himself.* . . . ' (Our italics.)

The constitutional privilege that a person shall not be required to be a witness against himself is of great value to a citizen accused of crime. But it is well settled that legislative bodies possess the power to authorize investigative proceedings to uncover crimes. Grand juries performed that function for many years before statutes providing for inquisitions such as the one under consideration were enacted. The functions of a grand jury are proceedings in the nature of judicial inquiry and are not criminal prosecutions. (*Hale v. Henkel,* 201 U. S. 43, 63-65, 50 L. ed. 652, 26 S. Ct. 370) Legislatures possess the power to grant amnesty to witnesses and to compel them to give testimony against themselves. Such power long has been recognized as a public necessity in the enforcement of laws. (*State v. Jack,* 69 Kan. 387, 396, 76 Pac. 911; *Jack v. Kansas,* 199 U. S. 372, 50 L. ed. 234, 26 S. Ct. 73.)

When immunity from prosecution has been granted on testimony adduced by a witness he no longer has a right to remain silent on the ground that his testimony might incriminate him. The reason is obvious. Personally he then is in the same position as though there were no statute which makes the acts concerning which he testifies a crime.

It must be remembered constitutional guarantees relied on by petitioners, except the fourteenth amendment to the federal constitution, apply only to criminal prosecutions. That is likewise true of section ten of the Kansas bill of rights. This inquisition is not a criminal prosecution. In it petitioners were not charged with any crime. The inquisition is only an investigative process to uncover crimes against the state of Kansas and to ascertain who committed them.

Furthermore, it is unnecessary to cite numerous authorities in support of the long established principle that the first ten amendments to the federal constitution operate on the national government only and were not intended to, and do not, limit the powers of the states in respect to their own people. (*Jack v. Kansas*, supra.)

In our own case of *State v. Jack*, supra, this court had under consideration an inquisition statute similar in all material respects to the instant one.

That statute pertained to investigations under our "anti-trust law" in which all the federal and state constitutional guarantees now relied on by petitioners were asserted except the sixth amendment to the federal constitution. The court held the statute was not unconstitutional, that it was a valid exercise of judicial power and the proceeding constituted "due process of law." (p. 394.) It further held that the recalcitrant witness was properly committed to imprisonment for contempt by reason of his refusal to answer questions propounded. It was held:

> "The immunity afforded by section 10 of the anti-trust law of 1897 to a witness subpoenaed in a proceeding or inquiry to testify to his knowledge of violations of that law is coextensive with the constitutional privilege that 'no person shall be a witness against himself'." (Syl. par. 3.)

The Supreme Court of the United States affirmed the decision. (*Jack v. Kansas,* supra.)

Petitioners contend they were deprived of counsel in contravention of the sixth amendment to the federal constitution. From an examination of the record it well may be debatable whether any of them actually demanded or requested counsel. They did, however, object to testifying on the ground they were without counsel. We have indicated previously (1) the sixth amendment to the federal constitution does not apply to state statutes and (2) this inquisition was a preliminary investigative proceeding to uncover crime and was not a criminal prosecution.

It is well settled an investigation of crime by a grand jury is not a criminal prosecution within the guarantee of the sixth amendment and a witness testifying before it is not entitled to advice of counsel. (*United States v. Blanton,* 77 F. Supp. 812; *Gilmore v. United States,* 129 F. 2d 199, [certiorari denied, 317 U. S. 631, 87 L. ed. 509, 63 S. Ct. 55]; *In re Black,* 47 F. 2d 542.) This court likewise has held a preliminary hearing in a felony case does not fall within the definition of a criminal prosecution and that, absent a statutory requirement, a defendant's rights are not invaded without the appointment of counsel for such a hearing. (*Fry v. Hudspeth,* 165 Kan. 674, 676, 197 P. 2d 945; *Dionne v. Hudspeth,* 166 Kan. 72, 73, 199 P. 2d 176.)

Petitioners stoutly contend the legislative history of the inquisition statute discloses it was not intended the inquisition should be held in secret. We shall not burden the opinion with a lengthy discussion of the subject. There is nothing in the present statute which in anywise

indicates a public hearing is contemplated. Proceedings before grand juries and similar investigative bodies seldom, if ever, have been conducted publicly. The reasons are clear. Some of the reasons for conducting such an inestigation without publicity are the importance of preventing scheming and conspiring to nullify the effectiveness of inquisitorial functions and to avoid the escape of those who later mght be prosecuted by reason of facts disclosed. Another reason is the cloak of secrecy protects witnesses, willing to assist in bringing to justice those who may be endangering the safety of society from unnecessary censure, criticism and abuse. (*State v. Branch*, 68 N. C. 186.) Constitutional provisions which require *that an accused* be permitted to meet witnesses face to face apply only to criminal prosecutions and not to mere investigative proceedings. Petitioners had not been accused of committing any crime.

Petitioners urge the statute provides no immunity from prosecution for violation of federal laws as distinct from state laws and the immunity guaranteed in the instant inquisition was, therefore, inadequate. The testimony elicited in this proceeding, which petitioners refused to answer, relates only to a violation of state laws. Under these circumstances petitioners are not in a position to complain immunity from prosecution under federal laws was not guaranteed. Moreover, the validity of petitioners' contention has been denied in connection with an inquisition conducted under our state "anti-trust law" even though a federal statute governing the same subject matter existed as applied to interstate commerce. In *State v. Jack*, supra, this court held:

> "A witness subpoenaed in a proceeding or inquiry to testify of his knowledge of violations of the anti-trust law cannot refuse to give his evidence on the ground that the immunity provided by section 10 of the act does not afford protection against the use of his evidence in a prosecution against him for violations of the federal anti-trust law." (Syl. Par. 4.)

On appeal to the Supreme Court of the United States that court in *Jack v. Kansas,* supra, held:

> "The provisions in the Kansas anti-trust law, as construed by the highest court of that State, compelling witnesses to testify as to violations of the act, and granting immunity from prosecution for violations testified to, or the use of the testimony against the witness, are not void under the Fourteenth Amendment, because immunity from Federal prosecution is not granted; and one committed, in accord with the provisions of the statute, for contempt for refusing to testify to acts within his knowledge is not deprived of his liberty without due process of law." (p. 372.)

See, also, *Hale v. Henkel,* supra, p. 68, in which *State v. Jack,* supra, and *Jack v. Kansas,* supra, are cited and again approved.

Petitioners complain of the presence and participation of special attorneys in the inquisition. They were all appointed pursuant to a resolution of the board of county commissioners at the nominal salary of $1.00 each to assist the county attorney in conducting the proceedings. The law authorizes the action of the board. (G. S. 1949, 19-723, 28-319; *Womer v. Aldridge,* 155 Kan. 446, 125 P. 2d 392.) Such attorneys were all duly sworn to discharge their duties as deputy county attorneys. As deputies they were only assisting the county attorney and had a right to act in that capacity. (*State v. McCombs,* 163 Kan. 225, 228, 181 P. 2d 473.)

The official transcripts of the original proceedings in each case have been carefully examined. We find no attempt to have them amended in any particular. They reflect no conduct which would justify nullifying the proceedings.

Petitioners argue the sentences and commitments for direct contempt are invalid in that they violate constitu-

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tional and statutory provisions. Briefly stated, petitioners assert they were accused of contempt, tried, convicted, sentenced and committed without formal charges first having been preferred against them, and without evidence or counsel.

Before proceeding to discuss the subject of contempt it clearly should be stated the penal provision of the statute making refusal to testify a misdemeanor punishable by fine or imprisonment, or both, was not invoked in these cases and we are not now concerned therewith. The court exercised only the statutory authority conferred upon it relative to direct contempt. And, as previously indicated, it had that inherent power independent of statute.

Petitioners' contention fails to recognize the distinction between direct and indirect contempt. It ignores the statute which provides persons shall be proceeded against for direct and indirect contempt only as prescribed by statute. (G. S. 1949, 20-1201.)

G. S. 1949, 20-1202, distinguishes between direct and indirect contempt as follows:

> "That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence, are direct contempts. All others are indirect contempts."

In proceedings for indirect contempt the law requires a written accusation, answer of the accused, a trial and a judgment based on testimony. That law also provides if the accused files an answer the trial proceeds on testimony as in criminal cases and the accused is entitled to be confronted with the witnesses against him. (G. S. 1949, 20-1204.)

In proceedings for direct contempt the law is entirely different. G. S. 1949, 20-1203, provides:

> "That a direct contempt *may be punished summarily, without written accusation against the per-*

son arraigned, but if the court or judge in chambers shall adjudge him guilty thereof a judgment shall be entered of record, in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto, and the sentence of the court thereon." (Our italics.)

G. S. 1949, 20-302, reads:

"The judges of the district courts, within their respective districts, shall have and exercise such power in vacation or at chambers as may be proided by law, and shall also have power . . . to punish for contempt in open court or at chambers, by fine, not to exceed one hundred dollars, and imprisonment or either, and to assign not exceeding one attorney to prisoners who may be unable to employ counsel."

The last preceding section does not limit contempt powers except in chambers. (*In re Millington, Petitioner, etc.,* 24 Kan. 214.)

Here we are concerned only with direct contempt of court committed in the presence of the presiding judge, who had personal knowledge of exactly what transpired. In *Savin, Petitioner,* 131 U. S. 267, 33 L. ed. 150, 9 S. Ct. 699, the court, speaking by Mr. Justice Harlan, said:

"We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors and witnesses, and misbehavior anywhere in such place is misbehavior in the presence of the court. It is true that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form,' *Ex parte Terry,* 128 U. S. 289, 309; whereas,

in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony unded oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished." (p. 277.)

And in *Cooke v. United States,* 267 U. S. 517, 69 L. ed. 767, 45 S. Ct. 390, Mr. Chief Justice Taft, speaking for the court, stated:

"To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. *There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense.* Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law." (Our italics.) (p. 534.)

Petitioners further argue there was no compliance with G. S. 1949, 20-1203 for the reason they were committed before judgment was entered of record. The journal entries in all three cases bear the exact dates on which petitioners were sentenced and committed. There is no evidence the journal entries were not prepared and signed by the district court judge on those dates. It is true that in two of the cases the journal entries were not actually filed until four days later and in one of them five days later, The official transcript of the record in each case, however, discloses sentence was pronounced and the petitioner was committed on the date indicated in the journal entries and at the time the witness refused to testify. A journal entry is evidence of the judgment rendered. Our view is the judgments of the court were properly preserved in the official records and there was substantial compliance with the statute in cases of direct contempt. The official rec-

ords preserved every act sufficiently to enable this court to examine the validity of every contention now advanced by petitioners or which might have been presented on a direct appeal from the judgment rendered under the provisions of G. S. 1949, 20-1205. The journal entries also complied with the requirements of G. S. 1949, 20-1203 in all other respects. On the subject of an insufficient record petitioners rely heavily on *Wallace v. Weber,* 134 Kan. 201, 5 P. 2d 855. A reading of the opinion will readily disclose no record of any kind was there made in the police court, where the alleged contempt occurred, until long after sentence was pronounced and the commitment was issued. In that case this court affirmed the decision of the district court releasing petitioner from custody on the ground of utter failure to comply with the provisions of the statute concerning the preserving of a record. In fact, the record of the police judge was so incomplete and imperfect it was difficult to ascertain what occurred at the contempt hearing. Furthermore the commitment itself did not state the facts upon which the contempt judgment was founded.

The syllabus in the Wallace case does not support petitioners' contention. If any portion of the opinion in that case is properly subject to the interpretation that in case of direct contempt a district judge is compelled to halt all judicial proceedings and prepare and file a formal accusation of contempt or file a journal entry of judgment before he pronounces sentence and issues a commitment, it is overruled.

We think it proper to say these cases were advanced for special hearing in order to comply with the urgent request of the parties for an early decision. In view of that request we have not extended the opinion with citation of additional authorities or with a review of numerous cases supplied by the industry of respective counsel. Their careful examination, however, has not altered or modified the views herein expressed. A few other interesting but not determinative matters referred to by coun-

sel for the respective parties need not be treated in view of conclusions previously expressed.

The petitions for writs must be denied. It is so ordered.

Smith, J. (dissenting): I find myself unable to agree with the opinion of the majority as to the statement of law contained in paragraph 2 of the syllabus and the corresponding part of the opinion.

My view is, only the first part of G. S. 1949, 62-301, confers authority and jurisdiction on any official or court to hold an inquisition. That applies to the laws of the state relating to gambling, intoxicating liquor or any violation of any law where the accused is a fugitive from justice. There is no pretense the case here falls into any one of those three categories. The remainder of the section refers only to procedural matters.

My basis for this conclusion is partly historical. The first of the inquisition statutes was enacted and passed in 1885. It was part of a chapter that amended the prohibitory law in force at that time then in an experimental stage. Since that time we have had many attorneys general assistant attorneys general and thousands of county attorneys. Not one of them up to now ever used that statute in conducting an inquisition such as this except under the three categories named.

What took place in this case is as potent an argument as could be made why the legislature never intended to give such sweeping powers to any court.

Here in the case of Courtney the petitioner was punished, not for refusal to answer any particular question, but for refusal to answer a question the way the special assistant attorney desired it to be answered. This official was exploring the question of to whom Courtney gave some fluid when he brought it to strike headquarters in his car. It is clear from the transcript that Courtney meant to say he did not give it to anybody, but whoever took it knew it was in his car and came and got it from

his car. The officials present, and there were none but officials present, were determined that he should say to whom he gave this and when he was unable to do so decided to punish him for contempt. Had they believed he was testifying falsely the remedy of the state was to try him for perjury, not to punish him for contempt. Such conduct is what the legislature endeavored to guard against by refusing to give such drastic power to courts and law enforcement officials.

The argument, the grand jury performed the function of investigation of crimes before statutes providing for inquisitions were enacted, leaving the implication there is more necessity for an inquisition statute relating to crimes generally than there was before, is not sound. I would be persuaded by it were it not for the fact the grand jury statute has continued on our books ever since first enacted in the early days of statehood. It is still extensively used where deemed necessary in ascertaining whether or not crimes have been committed. There is a great deal of difference in the consideration given the individual citizen when he is called to testify before a grand jury than when he is called before a judge of the district court holding a purported inquisition such as the majority opinion holds this statute provided for.

The grand jury is comprised of citizens of the community to which the witness belongs. There are twelve or more of his peers there on the grand jury when he is called upon to testify. The statute provides they shall be picked by lot. That is a far different affair from an inquisition such as described here, where the witness is called in before a battery of county attorneys, special county attorneys and police officers before a court selected by those officials when the inquisition was begun. This, in my opinion, is the reason the legislature never did intend that G. S. 1949, 62-301, should be given the construction the majority opinion gives it.

A persuasive incident to me is that when these men were sentenced, in one case to three months, and in the other cases to a year in the county jail, the sentences were not in the alternative that they should purge themselves of contempt, but were direct sentences to that much of a term in the county jail.

The entire affair was punitive and not in the interest of obtaining evidence. Had the investigation been carried on in good faith the sentences would have been, petitioners should be confined in the county jail for the terms indicated or until they should purge themselves of contempt.

Counsel in the oral argument stated such would be the construction given, that is, they would be offered an opportunity to purge themselves, but nowhere in this record do we find any such a provision in the so-called sentences.

It should never be overlooked, the qualification and the only qualification for an inquisitorial statute is, to obtain information. It is not punitive. The state in these proceedings argues in one breath the purpose is as above, hence the constitutional safeguards do not apply, and in the next breath conducts the inquisition so that the net result is punitive.

Should these petitioners see fit to stay in jail for the terms for which they were sentenced, and there is no indication they may be afforded an opportunity to do otherwise, then the end the state advances in the inquisition will be defeated.

Actually the state is by this proceeding avoiding the necessity for calling a grand jury. That is a time-honored institution for which our statutes still provide. It is calculated to safeguard the rights of witnesses as well as to aid in intelligent law enforcement.

Granting for the sake of argument that the inquisition had a legal basis, still I am convinced the record in this

case requires the granting of these writs. G. S. 1949, 62-301, provides, among other things, a witness may be imprisoned for contempt for any refusal to answer questions. This must be construed to mean any proper question or any question asked for the purpose of securing information bearing on the commission of any crime. That must be the proper construction since such is the only reason to justify an inquisition such as this. Obviously before a witness could be punished for contempt for refusing to answer a question, it must appear he was in possession of some such information. The matter of the testimony of Courtney, who was sentenced to three months in jail, has been dealt with already in this dissenting opinion. In the cases of Ferris and Park, each of whom was sentenced to a term in jail of a year, the transcript of the proceeding attached to the sheriff's return shows the only question asked either one of them bearing on his possession of information was whether he was a striking taxicab driver. There was no testimony whatever that either one of them knew any facts useful to the state. No questions were asked bearing upon the commission of any acts of violence.

These petitioners have been deprived of their liberty for a year. In my opinion where such a judgment is entered, be it the result of a conviction before a jury, or after a contempt proceedings, the basis therefor should be clear and free from doubt.

It is my opinion, the orders sentencing these petitioners were arbitrary and unreasonable and in making them the court abused its discretion. The fact that these sentences did not offer the petitioners the privilege of purging themselves of contempt by testifying adds weight to the above conclusion.

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